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Italian Judicial Activism in Light of French and American Doctrines of Judicial Review and Administrative Decisionmaking: The Case of Air Pollution

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* Ph.D European University Institute; JD Harvard Law School; DEA Université de Lyon; dott. di giur. Università di Bologna. This paper is based on part of the author's doctoral dissertation defended at the European University Institute in September 1985. It has been updated to reflect certain significant developments in Italian and European Community law.

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1. What makes Italian judicial activism unique

Italian judicial activism with respect to administrative action takes a form very different from judicial activism in the United States and France. Judges in all three countries are active in applying and shaping administrative law, but Italian judges are far more involved in substituting themselves for the public administration than French and American judges. French and American judges are limited to reviewing administrative decisions and to prodding the public administration into action. Although the activism of Italian judges may make sense in the context of the Italian public administration, their role as substitutes for that administration imposes political and economic costs that comparison with the United States and France will illustrate.

Air pollution law highlights the differences in Italian, French and American judicial activism especially well because it represents a relatively recent, major challenge to the legal systems of each of the three countries. Air pollution control also requires the public

administration, whether through direct command and control regulatory techniques or through economic incentive techniques,[1] to deal with a multitude of pollution sources which have widely varying technical and economic characteristics. The longstanding problems of the Italian public administration have caused it to have much greater difficulties in addressing air pollution than the French and American public administrations have had.[2] Accordingly, the Italian judiciary has mobilized in a unique way to meet the broad challenge posed by air pollution.

First, it has entertained aggressive criminal prosecutions of public officials and private parties for air pollution. Second, it has shown creativeness in developing its ability to hear civil and administrative actions concerning air pollution. By this conduct the Italian judiciary has acted as a substitute for regulation by the public administration, a role far more substantial than that assumed by French and American judges.

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1. See Bruce A. Ackerman and Richard B. Stewart, "Reforming Environmental Law," 37 Stanford Law Review 1333 (1985).

2. See Bruno Dente, Peter Knoepfel, Rodolfo Lewanski, Sofia Mannozzi, and Silvia Tozzi, Il controllo dell'inquinamento atmosferico in Italia: analisi di una politica regolativa (Roma, Officina Edizioni, 1984); Patrick Del Duca, "United States, French and Italian Air Pollution Control: Central and Local Relations as a Structural Determinant of Policy," 10 Loyola of Los Angeles International and Comparative Law Journal 497 (1988).

Absent legislative reform of the public administration, this judicial substitution will continue. Two developments even point to a reinforcement of the judicial role.

The 1986 law[3] which created the Ministry of Environment further institutionalized the role of the judiciary as a substitute for the public administration. Its failure to establish the Ministry of Environment as an operating ministry with its own personnel meant continuation of the existing organizational weakness of the public administration. Moreover, the law's provision of private and public actions for environmental damage constitutes legislative recognition of the greater actual importance in environmental matters of the judiciary relative to the public administration.

Judicial reliance on European Community law is yet another development which may consolidate substitution of the Italian judiciary for the public administration.[4] Although EEC directives are intended to be primarily

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3. Law no. 349 of July 8, 1986, Suppl. ord. Gazz. Uff. no. 162 of July 15, 1986.

4. In France the traditional fear of judicial lawmaking, the wide margin of executive discretion, the routine application of Community law by administrative measures, and the hostility of French courts to Community law doctrines of supremacy, imply that the judiciary will have only limited opportunities to invoke Community law as a way of judicially influencing air pollution control policy. See Del Duca, supra n. 2.

implemented at the member state level by legislative and administrative action, Italy has experienced significant delays in taking the necessary action. Thus, the judiciary, relying on the doctrine of the direct effectiveness against the state of sufficiently precise provisions of directives, may step into the breach. By this means Community and Italian legislation may come to further reinforce the judicial role in air pollution control.

The Italian judiciary's substitution of the public administration contrasts with the judicial role established by French and American doctrine on judicial review of administrative decisions. In both France and the United States this doctrine clearly limits the role of judges to review of the legality of decisions by the public administration.

The case law by which the Conseil d'Etat established the independence of the French administrative courts demonstrates that French judges are as capable of forceful activism as Italian judges. However, their forcefulness in matters of principle is blunted in practice by the traditional reluctance of the administrative courts to challenge specific administrative decisions. The statutory reform of the enquete publique proceeding provides an opportunity for the French courts to become more active in the review of administrative decisionmaking concerning air

pollution, without however becoming substitutes for the public administration as the Italian courts have done.

The contemporary American doctrine of judicial review of administrative decisions shares with the French doctrine the concept of judicial deference to the primary role of the public administration. However, the principle that a court may overturn decisions of the public administration if procedural values have not been respected is even more firmly established as the prevailing doctrine. In the United States it is also accepted as proper for the judiciary to oblige the public administration to take actions required by statute. But, even though this aspect of the role of judges in the United States is broader than that of French judges, it remains less aggressive than the direct judicial substitution for the public administration undertaken in Italy. After briefly reviewing the American "interest representation" model of judicial review, a case study of an administrative decision concerning air pollution will illustrate the United States theory of active procedural review, but substantive deference.

The contrast of the French and American situations to that of Italy will serve as the basis for some conclusions about the costs of Italian judicial activism. The structural reasons for which Italian judicial activism is unlikely to approximate the kinds of judicial activism in France and the United States will also be touched upon.

a. Politics and the Italian public administration

The active role of the Italian judiciary in air pollution control derives from general dissatisfaction with the Italian public administration. On a superficial level, it is easy to point to estimates that employees in some ministries work only two or three hours a day,[5] and conclude that gross mismanagement is the problem. The difficulties of the Italian public administration, however, run much deeper and are the product of a complex history and contemporary politics.

The embrace of pluralist democratic politics after World War II in reaction to the fascist debacle was a clear effort to legitimize political decisionmaking. The coalition politics and lack of alternation of the holders of power which have succeeded fascism, however, have not been conducive to the development of an impartial, competent public administration. Although governments change often, the composition of the governing coalitions is remarkably stable. The lack of alternation in political control prevents sweeping changes. At the same time, the fragility of particular governments combined with the stable party composition of successive governments has proven a fertile

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5. Sabino Cassese, Il sistema amministrativo italiano 119 (Bologna, Il Mulino, 1983).

ground for patronage. Despite constitutional checks on patronage, the direct infiltration of party control into the public administration has been massive.

Even beyond the identification of particular ministries with a certain party, the patronage phenomenon has influenced the administrative structure profoundly. In addition to the approximately twenty ministries composing the central government, there are two amministrazioni, four aziende autonome, and thousands of enti pubblici.[6] The amministrazioni are the state monopolies (tobacco, matches) and the postal service. The aziende autonome are the railroads, the highway department, the phone company, and an organization concerned with agricultural stabilization. Enti pubblici are a mixed bag of local and national quasi governmental organizations with responsibilities for municipal services, health care, pensions, and economic development. Many enti pubblici are simply publicly controlled business enterprises. The political parties have struggled mightily to use these various organizations to increase their power.[7]

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6. Id. at 17-18.

7. For example, the boards of directors of the enti pubblici make ideal patronage posts for administrative officials. Id. at 73.

In a country which suffers generally from chronic unemployment, and in which one area, the South, lags behind the rest of the country in economic development, there is a tendency to see employment in the public administration as a social welfare program. Although the Italian administration at the time of the unification of Italy was overwhelmingly dominated by Piedmontese, it has now become substantially meridionalized.[8] Throughout the country, employees from southern Italy represent a disproportionate part of public employees,[9] and featherbedding of the work force would seem to be especially pronounced in southern Italy.[10]

Although the political parties have penetrated deep into the public administration, the fragility of the governing coalition gives the administration a measure of independence. Bureaucrats remain in power much longer than individual ministers and governments. In fact, in 1921-1923 with the rise of fascism and in 1945-1948 with its substitution by a democratic form of government, the Italian political elites completely changed. In the public

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8. Id. at 115-17.

9. Id.

10. Id. at 282 gives the example of an office in Milan and an office in Naples with similar workloads. The Naples office had roughly a third more employees. (291 in Naples, 193 in Milan).

administration, however, there was substantial continuity.[11] Even today, Italian bureaucrats in positions of responsibility tend to be overwhelmingly men over fifty who have worked their way up through the ranks of the public administration.[12]

The weakness of Italian coalition governments has two immediate consequences -- the inability to organize the public administration and the inability to direct it.

With the passage of time, the organization problem becomes increasingly severe. It is evidently easier to add minor entities than to rework the underlying structure in a way that would have unforeseeable effects on party influence. Accordingly, the substantive division of responsibilities among the various ministries no longer corresponds to real social and governmental problems.[13]

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11. Id. at 55-56.

12. Id. at 65-66. One survey of 1400 senior civil servants and members of parliament in seven western democracies (including the United States and France) found that, "The average senior Italian bureaucrat entered the civil service at the age of 22, and there he has stayed for thirty-five years. More than 90 percent of the members of this gerontocracy have spent their entire adult lives in national government and more than 80 percent have spent all this time in a single ministry. Lateral entrants into the Italian bureaucratic elite are virtually nonexistent." Joel D. Aberbach, Robert D. Putnam and Bert A. Rockman, Bureaucrats and Politicians in Western Democracies 70-71 (Cambridge, MA, Harvard University Press, 1981).

13. Cassese, supra n. 5 at 274-75. At 274 he observes, "Il difetto principale dell'amministrazione italiana sta nella

The recent creation of a Ministry of Environment is an example of this phenomenon.[14] It is a ministry without portfolio and hence without any operating personnel. In connection with its creation no operating responsibilities were taken from any of the thirteen existing ministries with significant environmental responsibilities.[15] The Ministry of Environment's most significant operational power is the authority to substitute itself directly for regional, provincial or municipal authorities whose failure to apply environmental protection laws may lead to serious environmental damage.[16] How it will do so without personnel remains to be seen.

The inability of governments to direct the public administration has had a further negative consequence on parliamentary legislative activity. Italian legislation has become characterized by an excessive preoccupation for detail. Because governments have proven unable to direct

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irrazionale distribuzione delle funzioni." (The principal defect of the Italian administration is in the irrational distribution of functions.)

14. Law no. 349 of July 8, 1986, Suppl. ord. Gazz. Uff. no. 162 of July 15, 1986.

15. See The Law and Practice Relating to Pollution Control in Italy 20-22 (2nd ed., prepared by M. Guttieres, and U. Ruffolo for Environmental Resources Ltd., published by Graham and Trotman for the Commission of the European Community, 1982).

16. Article 8(3), law no. 349 of 1986.

the public administration, parliament has reacted by attempting to provide minutely precise direction to administrative action. In practice the detail frequently turns out to overlook important problems of implementation or to result in insoluble complexity. The final result is paralysis of administrative action due to an interminable series of administrative, judicial, and political proceedings to determine the meaning of legislative pronouncements. Italian substantive law on air pollution manifestly suffers from this phenomenon.[17]

b. Criminal actions and prosecuting judges

In Italy criminal actions are often used to compensate for administrative deficiencies.[18] These actions have been

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17. Major Italian laws relevant to air pollution control include: Articles 216, 217 TULS approved by royal decree no. 1265 of July 27, 1934, Suppl. ord. gaz. uff. no. 186 of August 9, 1934; law no. 615 of July 13, 1966, Gaz. uff. no. 201 of August 13, 1966; Presidential decree law no. 616 of July 24, 1977, Suppl. ord. gaz. uff. no. 234 of August 29, 1977, in implementation of the delegation of law no. 382 of July 22, 1985, Gaz. uff. no. 220 of August 20, 1975; law no. 833 of December 23, 1978, Suppl. ord. gaz. uff. no. 360 of December 28, 1978; and Decree no. 30 of March 28, 1983 Supp. ord. Gaz. uff. no. 145 of May 28, 1983. For review of these laws, see Del Duca, supra n. 2.

18. See Mario Cicala, Tutela dell'ambiente nel diritto amministrativo, penale, e civile 34-95 (Rovigno, UTET, 1976); Mario Pasquini, "Tutela della salute ed ambiente nei piu recenti orientamenti dottrinali e giurisprudenziali," in La Disciplina Giuridica della Protezione Contro Gli

facilitated by the powers of pretori. A pretore is a magistrate whose subject matter jurisdiction includes all crimes with a maximum penalty of less than three years of imprisonment.[19] The position of the pretore in Italy has been unique in that unlike other sitting Italian judges the pretore may initiate criminal actions and then pass judgment on them.[20] The code of criminal procedure to enter into force October 24, 1989 will alter this state of affairs.[21] It provides that in a given case the same magistrate may not fulfill the functions of both public prosecutor and judge.[22]

Because of the nature of the judicial career in Italy, pretori are often relatively young and enthusiastic. They have therefore been disposed to look for new ways to apply long standing criminal law providing for light penalties to

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Inquinamenti 71, 109 (Milano, Giuffre, 1980); Vittorio Denti, "Aspetti processuali della tutela dell'ambiente," in La responsabilita dell'impresa per i danni all'ambiente e ai consumatori, atti del convegno di studio, "Problemi attuali di diritto e procedura civile" 53 (Milano, Giuffre, 1978).

19. Article 31, code of criminal procedure. Article 7 of the new code of criminal procedure, to enter into force October 24, 1989, raises the outer limit from three years to four. Presidential decree law no. 447 of September 22, 1988, supp. ord. Gazz. uff. no. 250 of October 24, 1988 (hereafter the "new code of criminal procedure").

20. Article 74, code of criminal procedure.

21. New code of criminal procedure, supra n. 19.

22. Article 34(3), new code of criminal procedure.

environmental problems.[23] Although the new code of criminal procedure will end a pretore's ability to pass judgment on self initiated prosecutions, there is no reason to believe that the magistrates responsible for exercising the functions of public prosecutor will be any less vigilant than the pretori have been or that pretori will be unreceptive to well founded actions which a public prosecutor initiates.

i. Actions against polluters

The criminal provision most relied on in air pollution prosecutions is article 674 of the criminal code, which condemns offensive emissions.[24] One case involving prosecution under article 674 was against a gravel plant

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23. One of the best known of the so-called pretori d'assaulto (assault judges) wrote a "how to" book to explain to local citizen groups how to provoke legal actions against polluters and inactive public officials. See Gianfranco Amendola, In nome del popolo inquinato: Manuale giuridico di autodifesa ecologica (Milano, Franco Angeli Libri, 1985).

24. Criminal actions have been brought against polluters under a number of other statutory provisions. Article 635 of the criminal code provides for criminal liability for damage to property. Article 650 of the criminal code, providing for up to three months in prison for nonobservance of public health regulations, is used as are various other provisions of the criminal code dealing with criminal negligence. See articles 449-452, 589, 590, 639, 659, 660, and 675, criminal code.

causing air pollution.[25] The plant had a permit under the 1966 air pollution control law, which provides that the best technical controls possible are to be used.[26] The court held that article 674 meant that even if there was an administrative authorization, there was still criminal liability for noncompliance with article 674's ban on offensive emissions.

Applying criminal liability regardless of the compliance with permit conditions manifests an evident distrust in the public administration. Moreover, the penalty provided by the 1966 law for violation of permit conditions is at most 3,000,000 lire[27] (about $1,500), a sum which constitutes a minimal deterrent. By making recourse to article 674, there is at least the possibility of a short jail term, and the problems of proving a violation of permit

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25. "Inquinamento atmosferico: Legge antismog e contravvenzione punita ex art. 674 c.p.: scarichi in acque pubbliche di reflui industriali non autorizzati e non conformi ai massimi tabellari," Pretore di Menaggio, judgment of September 22, 1982, note by Paolo Nannarone, in 60 Il nuovo diritto; Rassegna Giuridica Pratica 58 (1983). See also Pretore of Naples, decision of November 6, 1979, 13 Giurisprudenza di Merito II, 454 (1981) (finding article 674 liability notwithstanding an administrative authorization under law no. 615 of 1966 if the law is violated or the authorization is otherwise not complied with).

26. Article 20, law no. 615 of 1966, supra n. 17.

27. Article 20, law no. 615 of 1966, supra n. 17 as modified by articles 34(h), 113, law no. 689 of November 24, 1981, Supp. ord. gaz. uff. no. 329 of November 30, 1981 (tripling the original criminal penalties).

conditions are avoided. This does not mean that article 674 by itself is an effective deterrent to pollution. By its very nature as a criminal provision, its use is limited to isolated, after the fact prosecutions. In the case just discussed the polluter was condemned to a 50,000 lire fine (about $25), hardly an effective deterrent.

The need to coordinate criminal code provisions with more recently adopted air pollution laws can produce forced results on occasion. For example, in a proceeding against managers of industrial installations near Taranto, the pretore distinguished between emissions of dust and smoke.[28] In this pretore's view the joint effect of article 674 of the criminal code and of the 1966 law on air pollution was as follows. With respect to smoke emissions, respect of the 1966 law implied no possibility of criminal liability. On the other hand, with respect to dust emissions, compliance with the 1966 law was irrelevant to the existence of criminal liability under article 674. Without entering into the merit of the rather close statutory interpretation used to reach this conclusion, it is quite clear that the distinction has no rational scientific basis. This type of result is one of the costs of the lack of a coherent

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28. Pretore of Taranto, judgment of July 14, 1982, 15 Giurisprudenza di Merito II, 677 (1983).

statutory scheme and of an effective public administration to manage the air pollution problem.

The actions so far discussed have had environmental benefits chiefly through their deterrent effect. That is, they work by inducing fear of penalties for not complying with what administrative scheme there might be or for causing emissions in violation of limits, albeit imprecise, established through criminal law. The more extreme form of this kind of action involves the use of the article 674 criminal action as a complete substitute for effective administrative action.

An example is an article 674 proceeding brought by a pretore against essentially all of the major industries surrounding the city of Taranto.[29] The investigations preliminary to issuing the decision took two years and involved numerous experts, citizen groups, and industry representatives. The result was four condemnations to fifteen days of arrest and three 600,000 lire fines (about $300), all suspended on condition that the offending conditions be eliminated within a year. Although the penalties imposed are light, the decision is important because it does what the public administration had not done,

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29. Pretore di Taranto, judgment no. 2095 of July 31, 1982, 1983 Rivista Penale 190, with note by Amedeo Postiglione, "Verso un diritto all'ambiente," 1983 Riv. pen. 196.

i.e. provide for a way to require reduction in pollution levels. The case is a clear example of judicial substitution for the public administration. The kind of investigation undertaken and the information which had to be weighed are more typical of an administrative rather than a criminal proceeding.

ii. Actions against public officials

Article 28 of the constitution makes public employees criminally and civilly responsible for action not in accord with the law. Article 328 of the criminal code is the specific provision under which officials have been criminally prosecuted for failure to exercise review or decision functions with regard to air pollution.[30] By making recourse to this provision the pretori are requiring officials of the public administration to act, a function ordinarily reserved to executive, legislative, and administrative authorities. The difficulty with relying on

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30. E.g. Pretore Soave, judgment of May 9, 1978 in 55 Foro amm. I, 2000 (1979); Pretore Gela, judgment of February 9, 1980, 86 La Giustizia Penale II, 109 (1981). See also Paolo Vittorio Lucchese, "Omessa istituzione del servizio di rilevamento dell'inquinamento atmosferico," 14 Giurisprudenza di Merito IV, 487 (1982). In this article Lucchese, the pretore of Gela who wrote the judgment of February 9, 1980, explains to other pretori how to use article 328 to prosecute provincial administrations for failure to set up monitoring networks.

criminal responsibility of public officials rather than on effective administrative or political accountability is the harshness of criminal sanctions for the lax exercise of often highly discretionary authority.

It is also difficult to identify which officials are in fact responsible for the complete absence of administrative capability to deal with air pollution problems. In one case this problem was overcome on the theory that the local pollution problem was so blatantly obvious that the head of the provincial administration which failed to create a monitoring network must have been aware of it.[31] Citizen groups which wish to provoke prosecutions of public officials are advised to first call the problem to the attention of the officials in writing so as to create a record of willful neglect.[32]

Finally, criminal prosecutions occur only in limited cases and only after the fact of grave environmental damage. Accordingly, article 328 prosecutions may be useful, but are not as desirable as an effective public administration in the first instance would be.

The jurisprudence of the Court of Accounts, a special administrative court responsible for review of state

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31. Pretore Gela, supra n. 30.

32. See Amendola, supra n. 23.

finances, has developed in a way such that its accounting actions serve a function quite similar to article 328 criminal prosecutions of public officials.[33] On the basis of provisions establishing the liability of public functionaries for damage caused to the state,[34] the Court has held that public officials can be personally responsible for damages to the environment caused by failure to carry out their responsibilities or by negligent decisions.[35] The facts related to an authorization to build a tourist village in a national park. In a subsequent appeal the Court reaffirmed this decision and specified that the damages were due to the state, not to municipalities or regions when functionaries or agents of the public administration were

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33. On the Court of Accounts, see Francesco Di Renzo, La Corte dei Conte (Napoli, Societa Editrice Napoletana, 1978). For discussion of the Court's activities with regard to air pollution, see Franco Giampietro, Diritto alla salubrita dell'ambiente: inquinamenti e riforma sanitaria 8-21 (Milano, Giuffre 1980). Article 18(2) of law no. 349 of July 8, 1986 preserves the Court of Accounts' jurisdiction.

34. Articles 82-83, royal decree no. 2440 of November 18, 1923, Gaz. uff. no. 275 of November 23, 1923.

35. Court of Accounts, sez. I, decision no. 39 of May 15, 1973, 49 Foro amm. I, section 3, 247 (1973). See also Court of Accounts, sez. I, decision no. 61 of October 8, 1979, 56 Foro amm. I, 825 (1980) (official who authorized discharge of titanium oxide into the ocean near Livorno held personally liable for the damages incurred).

prosecuted for environmental damages.[36] Damages were finally assessed at one billion lire (about $500,000).[37]

The Court acknowledged the difficulties of quantifying in monetary terms the damage caused to the National Park by allowing the construction of fourteen kilometers of road and construction of a fifty hectare subdivision from 1962 to 1964. It arrived at the damage assessed by considering estimates of the costs of destroying the subdivision, restoring the land, damage to the image of the park, and damage to flora and fauna.

Because the laws establishing the Court of Accounts' jurisdiction were enacted before environmental problems rose to public consciousness[38] and hence do not specify a measure of environmental damages, the Court simply picked what it felt to be a reasonable figure. The 1986 law creating the Ministry of Environment subsequently specified criteria for quantifying damages.[39] Damages are now to be calculated "equitably," taking into account the seriousness of individual fault, the cost of restoration, and the profit

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36. Court of Accounts, sez. I, decision no. 108 of December 20, 1975, 52 Foro amm. I, 1669 (1976).

37. Court of Accounts, sez. I, decision no. 86 of September 18, 1980, 57 Foro amm. I, 975 (1981).

38. See Filippo Salvia, L'Inquinamento: Profili Pubblicistici 157-64 (Padova, CEDAM 1984).

39. Art. 18(6) of law no. 349 of July 8, 1986.

realized by the defendant. Because state employees are unlikely to have the assets to pay large judgments, the determination of the particular amount of the damages may often be academic. In such cases, the assessment of damages is more a punishment than a means of compensating the state.

Actions before the Court of Accounts to recover damages to the state are brought by the Procuratore generale, a career prosecutor of the Court.[40] Other parties may not bring actions in the public interest although they can always ask that an action be commenced and once an action has started, they may participate freely.[41] The Court of Accounts has also allowed public entities to freely participate.[42]

c. Civil and administrative actions

The availability of the civil and administrative courts for environmental actions has increased greatly in recent

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40. Article 195, Regolamento per l'amministrazione del patrimonio e per la contabilita generale dello stato, royal decree no. 827 of May 23, 1924, Supp. ord. gaz. uff. no. 130 of June 3, 1924; article 4, regolamento di procedura per i giudizi innanzi alla Corte dei Conti, royal decree no. 1038 of August 13, 1933, Gaz. uff. no. 194 of August 22, 1933.

41. Article 47, royal decree no. 1038, supra n. 40.

42. Court of Accounts, sez. riuniti, decision no. 290/A of October 29, 1981, 58 Foro amm. I, 1106 (1982).

years, most notably after enactment of the law creating the Ministry of Environment,[43] which also unequivocally established liability to the state for environmental damage. Before analyzing the liability provisions of this law, it will be useful to review the case law which anticipated it as a further illustration of Italian judicial activism.

The Court of Cassation, supported by the Constitutional Court[44], broadened the standing criteria for environmental actions in the civil and administrative courts. It also made injunctive relief available against pollution responsible for health damage, a kind of relief not previously available. Each of these topics will be analyzed following some background on the distinction in Italy between civil and administrative jurisdictions.[45]

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43. Law no. 349 of 1986, supra n.3.

44. Constitutional Court, decision no. 88 of July 26, 1979, 53 Rac. uff. 59 (1979); 24 Giur. cost. 656 (1979). In this decision the Constitutional Court has accepted the application of article 32 of the constitution to directly provide individual and collective rights to health. It has also found that articles 2043 and 2059 of the civil code, which concern compensation for damages, to be constitutional provided that they are interpreted to refer not just to property damages, but also to damage to the constitutionally protected right of health. Id. By this decision the Court rejects the previous doctrinal position that compensation was available only for loss of earning capacity. For review of previous Italian doctrine on personal injury compensation, see Adele Anzon, "L'altra 'faccia' del diritto alla salute," 24 Giur. cost. 657 (1979) (note).

45. The conversion of the Consiglio di Stato into an administrative court of second instance in 1971 by the

The standing requirements before the civil and administrative courts are respectively a "subjective right" and a "legitimate interest." Private parties may bring actions against the public administration before both the civil and administrative courts according to the classification of the interest at issue. Simple interests are those where the individual has no particularized interest in the outcome of a decision beyond the general interest in sound public decisions. Such interests are not accorded any judicial protection.

At the other end of the scale are subjective rights, which are rights recognized as belonging exclusively to their owners and protected in a direct and immediate manner.[46] Such interests may be protected by an ordinary civil action. Remedies include damages and injunctions staying the application of the adverse administrative decision.

Legitimate interests are ranked lower than subjective rights, but are actionable before the administrative courts. A legitimate interest is an individual interest strictly

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creation of regional administrative courts of first instance has also broadened the accessibility of administrative justice. Law no. 1034 of December 6, 1971, Gaz. uff. no. 314 of December 13, 1971. The jurisdiction of the civil courts includes all criminal matters.

46. Guido Landi and Giuseppe Potenza, Manuale di diritto amministrativo 146 (7th ed., Milano, Giuffre, 1983).

connected to a public interest and protected only in an action to protect the public interest.[47] When the jurisdiction of the administrative courts is invoked to protect a legitimate interest, they have the power to annul the challenged order.

Whether a subjective right or a legitimate interest is involved depends on whether a norma di relazione or a norma di azione is at issue. A norma di relazione involves a direct relationship with an individual, whereas a norma di azione has to do with the functioning of the public administration. The subtleties of this distinction are illustrated by the example of expropriation.[48] If there is a claim that the expropriating governmental body is not the correct one, or that there is a procedural flaw in the expropriation, the individual whose property is being expropriated has a legitimate interest to protect before the administrative courts. The individual's particular interest is made protectable by the general interest in the correct procedural functioning of the administration. In contrast, a claim that the compensation is inadequate is a claim of subjective right. The individual's property right is an

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47. Id. at 149.

48. Id. at 151.

individual, personal entitlement, which therefore is protectable before the ordinary courts.

These jurisdictional criteria for deciding between the civil and administrative courts are complex. In France, where there are also civil and administrative courts, the criterion is the simpler one of whether the suit is against the state.[49] The complexity in Italy derives from the 1865 law which gave the civil courts the power to entertain cases against the public administration when subjective rights are involved. Giving the ordinary courts this jurisdiction was seen as a guarantee of liberty because of the civil courts' greater independence and accessibility than the Council of State.[50] The notion of legitimate interests as the criteria for administrative and civil jurisdiction entered Italian law through the 1889 law creating an adjudicative section in the Council of State.[51] The ambiguities in the distinction

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49. See text infra at notes 113 to 115.

50. See Mario P. Chiti, Partecipazione popolare e pubblica amministrazione 258-63 (Pisa, Pacini, 1977).

51. The provision is article 3, law no. 5992 of March 31, 1889, now contained in article 26, Royal decree no. 1054 of June 26, 1924, Gaz. uff. no. 158 of July 7, 1924. Substantially unchanged, it reads, "Spetta al Consiglio di Stato in sede giurisdizionale di decidere sui ricorsi per incompetenza, per eccesso di potere o per violazione di legge, contro atti e provvedimenti di un'autorita amministrativa o di un corpo amministrativo deliberante, che abbiano per oggetto un interesse d'individui o di enti morali giuridici . . . ." (It is for the Council of State in its judicial capacity to decide on challenges for lack of

between legitimate interest and subjective right are becoming increasingly apparent as the volume of administrative litigation grows and as the action of the public administration increases in scope.

i. Breaching jurisdictional boundaries

In the event of a dispute over whether the civil or administrative courts have jurisdiction, it is possible to ask the Court of Cassation for a preliminary ruling as to which court has jurisdiction.[52] In a number of these preliminary rulings the Court of Cassation has enlarged the scope of actions entertainable before the civil courts, and by implication, before the administrative courts as well.

In a 1979 case[53] the neighbors of a potential nuclear power plant site brought an action before a civil court asking for a preliminary technical study before further decisions on siting the plant were made. A complex

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jurisdiction, excess of authority or violations of law against acts and provisions of an administrative authority or a deliberative administrative body, which might have as their object an interest of an individual or of a legal person . . . .)

52. Articles 41 to 50, code of civil procedure.

53. Court of Cassation, sez. unite civili, decision no. 1463 of March 9, 1979, ENEL v. Eusebione, 102 Foro it. I, 939 (1979) (regolamento di giurisdizione).

administrative procedure for siting nuclear plants was provided by law; however, in response to a request for a preliminary ruling on jurisdiction the Court of Cassation decided that the neighbors could bring their action in the civil courts.

The Court of Cassation distinguished between two kinds of interest: indivisible and divisible. Examples it gave of indivisible interests are national defense and public order. Divisible interests include health and environmental protection. In the Court's view, what distinguishes divisible from indivisible interests is the ability to identify an individual interest distinct from the collective interest. By limiting jurisdiction to those cases where an individual, i.e. divisible, interest can be identified, the Court's hope is to anchor itself on the slippery slope leading to full judicial involvement in political issues.

In this particular case, the Court found that the neighbors met the requirement for an actionable interest because their property and environmental interests as farmers were potentially violated. In this case, the plaintiffs needed to show a subjective right because they were attempting to bring their action before the civil courts. The Court held that their interests constituted a subjective right, rather than non actionable diffuse or indivisible interests, because they had particular interests distinct from the general interest.

A subsequent decision of the Court of Cassation, issued only a few months later,[54] amplifies the analysis of the preceding case. This decision was also rendered in a preliminary jurisdictional proceeding. In the suit three neighbors of the site of a proposed sewage plant for Naples complained that it would degrade environmental quality and produce noxious emissions. The Court held that even though the health interests involved were shared by an indefinite number of subjects, they still constituted an actionable subjective right by virtue of the constitutional declaration of the right to health in article 32 and the article 24 of the constitution guarantee of the ability to seek judicial protection of one's rights. The Court stated that the diffuse character of the interests at stake constituted no barrier to the existence of a subjective right.

Article 32 of the Italian constitution defines health as a fundamental individual right and a collective interest. Some doctrinal writers have suggested that the way the Court of Cassation has interpreted this constitutional provision should also have a broadening effect on the kinds of actions entertainable before the administrative courts. In particular, the Court of Cassation, in its role as the court

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54. Court of Cassation, sez. unite civili, decision no. 5712 of October 6, 1979, Cassa per il Mezzogiorno v. Langiano, 102 Foro it. I, 2302 (1979) (regolamento di giurisdizione).

which draws the bounds of civil and administrative jurisdiction, could permit challenges by third parties against administrative authorizations which would lead air quality limits established by law to be exceeded, e.g. air pollution permits.[55] Doctrine has already urged that the 1978 law on health care reform[56] accords individuals the necessary legitimate interest in health.[57] Either the 1978 law or the constitution itself could be the basis of allowing such actions.

The fact that interests in health are involved may be the determining factor to allow third party challenges to air pollution permits. The Court of Cassation has held that being a resident of a municipality is insufficient to accord a legitimate interest to challenge the award of a building permit.[58] The factor distinguishing this case from the air pollution example is the direct relevance of health interests in the case of air pollution. Because of the health impacts of air pollution, the constitutional right to

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55. For reservations about such a strategy, see Salvia, supra n. 38 at 80-83.

56. Law no. 833 of December 23, 1978, supp. ord. Gaz. uff. no. 360 of December 28, 1978.

57. Giampietro, supra n. 33 at 72.

58. Court of Cassation, sez. unite civili, decision no. 5530 of October 25, 1982, Gaspari v. Rossi, 105 Foro it. I, 2776 (1982) (regolamento di giurisdizione).

health may lead the Court of Cassation to find that there does exist the individual interest necessary to support standing and hence jurisdiction with respect to challenges of improperly granted air pollution permits.

The ultimate effect of the Court of Cassation's jurisprudence concerning the right to health could be that environmental claims might be made either to the civil or administrative courts depending on the remedy sought. For air pollution permits the difference in available remedies may not matter because a successful action in either set of courts could block the effectiveness of a permit. The possibility of raising environmental claims in either civil or administrative proceedings in combination with the direct effect of Community directives establishing air quality limits, a topic discussed below in section d, may become an important addition to the judicial tools for preventing environmental degradation.

ii. Expansion of injunctive remedies

In civil actions concerning air pollution, the provisions most relied on are article 2043 of the civil code dealing with damages for illicit conduct and article 844 of the civil code dealing with property rights. Peripherally

relevant are articles 890, 2049, 2050, and 2051 of the civil code dealing with civil liability.[59]

In a civil action against a polluter, the two goals of the action are to obtain damages and to require that the offensive pollution cease. Until recently an action for both damages and an injunction was limited to property owners to protect their property rights. Judicial decisions have now changed this result by allowing individuals other than property owners to obtain injunctive relief to protect health rights.

Article 844 of the civil code permits a kind of nuisance action by property owners if levels of pollution exceed the "normal levels of tolerability."[60] Article 2043

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59. Article 890 provides that machinery or harmful materials placed on property must respect the required distances from the boundaries established by safety regulations, or in the absence of such regulations, the distances required for safety. Article 2049 makes principals responsible for negligence of their agents, e.g., an employer is responsible for acts of an employee. Article 2050 makes anyone engaging in a hazardous activity responsible for the resulting damages unless they can show that they adopted all useful measures to avoid the damage. Article 2051 provides that the custodian of things is responsible for any damage they cause except in case of fortuity.

60. It provides, "Il proprietario di un fondo non puo impedire immissioni di fumo o di calore, le esalizioni, i rumori, gli scuotimenti e simili propagazioni derivanti dal fondo del vicino, se non superano la normale tollerabilita, avuto anche riguardo alla condizione dei luoghi. Nell'applicare questa norma l'autorita giudiziaria deve contemperare le esigenze della produzione con le ragioni della proprieta. Puo tenere conto della priorita di un

of the civil code is a general tort liability provision. It provides for award of damages whenever through negligent or intentional conduct an unjust injury is caused.[61]

Both the Constitutional Court[62] and the Court of Cassation[63] have taken article 844 at face value and considered it as dealing only with property rights. Article 2043 has instead been used as the vehicle for giving content to the article 32 of the Constitution declaration of the right to health.[64] The limitation of using articles 844 and

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determinato uso."

(The proprietor of land cannot require cessation of ambient concentrations of smoke or heat, emissions, noises, vibrations and similar propagations deriving from land of a neighbor, unless they exceed the normal levels of tolerability, having regard to the condition of the surroundings. In applying this norm the judicial power must balance the needs of production with property rights. It may take account of the priority of a particular use.)

61. It provides: "Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno." (Any intentional or negligent fact which causes another an unjust damage, obliges the one who committed the fact to compensate the damage.)

62. Constitutional Court, decision no. 247 of July 23, 1974, Dido v. Rosina, 42 Rac. uff. 241, 245-46 (1974); 19 Giur. cost. 2371, 2375 (1974).

63. Court of Cassation, decision no. 1976 of May 19, 1976, Giur. it. 1978, I, 1, 412; Court of Cassation, II sez., decision no. 2396 of April 6, 1983, Giur. it., 1984, I, 1, 537, note by Fulvio Mastropaolo, at 559.

64. Constitutional Court, decision no. 247 of March 23, 1974, supra n. 62; Court of Cassation, sez. I, decision no. 837 of March 7, 1975, Societa Roda v. Rigamonti, 45 Mass.

2043 in this way was that injunctive relief was not available to prevent health damage. Article 844's provision for injunctive relief was limited to property rights, and article 2043 provided only for award of damages, not for injunctive relief. The Court of Cassation, in a case involving a noisy boiler in the central heating system of an apartment building, has since taken the position that because of the constitutional importance of the right to health, the injunctive powers available under article 844 may by analogy be applied to prevent conditions causing health damages.[65]

iii. The broad concept of damages

In the same decision, the Court went on to conclude that damages under article 2043 were not limited to traditional property damages. To do so it had to overcome article 2059 which limits award of nonproperty damages to cases specifically determined by law.[66] It overcame article 2059 by determining that its reference to nonproperty

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Giur. it. 228, 229 (1975) (headnote only).

65. Court of Cassation 1983 supra n. 63 at 560.

66. It provides, "Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge." (Non property damage must be compensated only in the cases determined by law.).

damages meant only emotional and psychic damages ("dolore, sofferenza, tristezza,") i.e. pain and suffering.[67] The Court had previously held that damages under article 2043 were not limited to decrease in earning potential, but instead included the value of injuries per se.[68] In the present decision the Court further broadened the kind of damages compensable under article 2043. After noting that article 2043 applied not to property damage, but rather to "unjust damages,"[69] the Court defined unjust damage as including not only injury to the person objectively measurable in an economic sense, but also injury measurable only in a subjective way, i.e. biological and social damage.[70] By taking this broad position on the recovery of damages, the Court has increased the capacity of the judiciary to substitute itself for the public administration

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67. Court of Cassation 1983 supra n. 63 at 563.

68. Court of Cassation, III sez., decision no. 3675 of June 6, 1981, Ferrane v. Lisi, 104 Foro it., I, 1884, 1888-89 (1981). Accord, Constitutional Court, decision no. 88 of July 26, 1979, supra n. 44.

69. Court of Cassation 1983, supra n. 63 at 562.

70. Unjust damage includes injury to "il complessivo valore della persona, nella sua proiezione non solo economica e oggettiva fatta palese del patrimonio, ma anche soggettiva (biologica e sociale) . . ." Id. (the complete value of the person, not only in its economic and objective dimension made obvious by property, but also in the subjective dimension (biological and social) . . .).

in resolving environmental issues. The Constitutional Court has affirmed this orientation of the Court of Cassation.[71]

The 1986 law which created the Ministry of Environment also provides for the recovery of environmental damages. Because its recovery provisions are limited to reimbursement of damages to the state, the previous jurisprudence on private recovery of damages would seem to have continuing viability. The 1986 law requires the author of "any negligent or intentional act in violation of law or provisions adopted on the basis of law which compromises the environment" to reimburse the state.[72] The state and the relevant territorial entities are authorized to bring the appropriate actions for recovery in the ordinary courts.[73] Associations designated by the Minister of Environment[74] as well as "citizens" may "denounce the environmentally harmful acts" for the purpose of soliciting the State and the relevant territorial entities to bring recovery actions.[75] The provision for state recovery of damages is implicit

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71. Constitutional Court, decision no. 184 of July 14, 1986, Gazz. uff., prima serie speciale no. 35 of July 23, 1986.

72. Article 18(1), law no. 346 of July 8, 1986, supra n. 3.

73. Id., Article 18(2).

74. See infra notes 78 to 80.

75. Article 18, law no. 346 of July 8, 1986, supra n.3.

legislative recognition of the public administration's inability to prevent the infliction of damages in the first place.

iv. Environmental associations and standing

The broad conception of damages, the opportunity to generally obtain injunctive relief in civil actions, and the broadening of the jurisdictional criteria for the civil and administrative courts are contrasted by a seeming reserve against granting standing to public interest groups.[76] The landmark legislation which created the Ministry of Environment and which expressly provided for the state's recovery of environmental damages also altered the position adopted by case law with regard to the standing of environmental associations.

Following the development of a complex body of case law, parliament granted to certain environmental protection associations the right to seek the annulment by the administrative courts of "illegitimate acts."[77] The limitation of the right to seeking annulment, rather than recovery of damages, is consistent with the administrative

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76. See Salvia, supra n. 38 at 64-73.

77. Article 18(5), law no. 349 of 1986.

courts' inability to award damages. The authorized associations are named by decree of the Minister of Environment.[78] Associations eligible to be named are those of a national character and those present in at least five regions.[79] The Minister is to choose these associations on the basis of their programmatic goals and of the democratic nature of their internal organization as established by their charter, as well as by the continuity of their action and of its external relevance.[80] The case law leading up to this statute shows how judicial activism may stimulate legislative activity in Italy.

Italia Nostra, an Italian conservation group, was a pioneer in the effort to bring public interest actions.[81] It met with some success when the highest administrative court, the Council of State, granted it standing to challenge the administrative authorization of a road threatening a lake.[82] The narrowly drawn decision

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78. Article 13(1), id.

79. Id.

80. Id.

81. For a list of Italian environmental organizations and description of their activities, see Amedeo Postiglione, Manuale dell'Ambiente: Guida alla legislazione ambientale (Roma, La Nuova Italia Scientifica, 1984).

82. Council of State, sez. V, decision no. 253 of March 9, 1973, Italia nostra v. Giunta provinciale di Trento, 97 Foro it. III, 33 (1974).

recognized it as a moral entity fulfilling a state role on the basis of its state charter. It was allowed to bring the action because its state charter anticipated such an activity. Shortly thereafter, in a criminal action against officials who expanded a campground in a public park, the Court of Cassation denied Italia Nostra standing to join the criminal proceeding as a civil party on the ground that it could show no damage to its interests.[83]

Then, even the Council of State denied Italia Nostra standing in a case involving construction which threatened the scenic beauty of a national park.[84] The Council of State reasoned that there may exist a legitimate interest in environmental protection, but to bear such an interest, a group or individual must have a specific interest distinguishable from the general public interest. The Council of State found that as a national organization with an abstract charter, Italia Nostra did not have interests tied to a particular natural environment more or less definable in some way.

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83. Court of Cassation, VI sez. (criminal), decision of January 15, 1974, 98 Foro it. II, 146 (1975) (To join criminal proceedings as a civil party, Italia Nostra would have to have suffered some private law property damage. Moral injury is insufficient.).

84. Council of State, adunanza plenaria, decision no. 24 of October 19, 1979, Italia Nostra v. Sopraintendenza ai monumenti, 132 Giur. it. III, section I, 81 (1980).

These decisions against Italia Nostra limited the ability of environmental groups to undertake public interest litigation. The 1986 legislation overcomes the limitation only for associations designated by the Ministry of Environment in conformity with the statutory requirements. The limiting judicial decisions express the Italian concern for categorizing rights and interests, and thereby limiting standing to avoid involving courts in politically debated questions.

Nonetheless, the opening of the courts to individual claims of damage because of environmental degradation has had some effect on the treatment of associations. Even the Council of State appears willing to allow associations to bring administrative actions if they can show some specific damage. The Council of State has also determined that for purposes of intervening as amici curiae (intervento adesivo), the degree of interest required by an association is less than if the association attempted to bring a proceeding on its own behalf. It accordingly allowed amicus interventions by Italia Nostra and the Italian chapter of the World Wildlife Fund in an administrative judicial proceeding.[85] Likewise, pretori continue to allow

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85. Council of State, sez. IV, decision no. 114 of February 22, 1980, Soc. A. TRA. FO. v. DiBattista, 31 Consiglio di Stato I, 159, 162-63 (1980).

individuals, local associations, and even Italia Nostra to participate as parties in criminal proceedings concerning environmental degradation.[86] The Court of Cassation has even permitted a mayor, as representative of a municipality, to become a civil party to a criminal proceeding to seek damages for unauthorized construction.[87] Finally, there is a persistent doctrinal current in favor of allowing both individuals and associations to bring environmental actions in competition with actions instituted by the public minister as representative of the public interest.[88]

The bottom line of the Italian jurisprudence on standing may be very similar to that of American jurisprudence. In 1972 the Sierra Club managed to have a case reach the United States Supreme Court in which it

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86. See, e.g., Pretore di Soave, judgment of May 9, 1978, 55 Foro amm. I, 2000 (1979) (but drawing the line to exclude political parties); Amedeo Postiglione, "Soggetti legittimati a far valere il danno da inquinamento atmosferico," in 1979 Giur. merito I, 407; Franco Fiandanese, "La tutela penale dell'ambiente. Aspetti generali," 88 Giust. pen. II, 594 (1983); Salvia, supra n. 38 at 69 n. 60 (citing three criminal cases in which Italia nostra was permitted to intervene as a civil party). Allowing private parties to participate in criminal proceedings is an accepted procedural device in Italian law if they can show damages. See article 74 et seq., new code of criminal procedure, supra n. 19.

87. Court of Cassation, III sez. penale, decision of October 24, 1978, 85 La Giustizia Penale III, 13 (1980).

88. See Amedeo Postiglione, Il diritto all'ambiente 177-82, 188-91 (Napoli, Jovene editore, 1982).

asserted that as an association it was entitled to bring an action to block development of a ski resort.[89] The Supreme Court denied that its "moral interest," to use the Italian terminology, in protecting the mountains was sufficient to accord it standing. By amending its complaint to allege that individual interests of its members in recreation were damaged, the Sierra Club was easily back in Court.[90] The ultimate result in Italy may be similar. That is, environmental groups may be blocked from litigating on the basis of injury to their self declared purposes; however, it may be easy for them to demonstrate the required specific damage to obtain standing. And of course, if an association is duly designated by the Ministry of Environment, injury to its declared purposes would be a sufficient basis for it to bring an action for annulment of a decision by the public administration.

d. EEC environmental law as a new judicial tool

As a further spur to administrative action, the Italian judiciary may next look to the Community law doctrine of

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89. Sierra Club v. Morton, 405 U.S. 727 (1972).

90. See William H. Rodgers, Handbook on Environmental Law 23-25 (St. Paul, Minn., West Publishing Co., 1977).

direct effect. The direct effect of directives has been developed through jurisprudence of the European Community Court of Justice not entirely self evident from a literal reading of Article 189 of the EEC Treaty.

Direct effect refers to the immediate effectiveness of provisions of Community law without the need to await member state implementing measures. The doctrine applies to three kinds of provisions of Community law. Regulations are made directly applicable by article 189 of the EEC treaty. Certain treaty provisions are also by their terms directly applicable.[91] The most remarkable application of the doctrine of direct effect is to directives. It is also the most important for environmental policy because of the quantity of environmental directives.

The application of the direct effect doctrine to directives is remarkable because pursuant to article 189(3) of the EEC treaty, member states are obliged to take steps to achieve the result sought by a directive, but the choice

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91. See case 26/62, van Gend & Loos v. Nederlandse administratie der belastingen, 1963 ECR 1 (increase in customs duty declared illegal pursuant to article 12, EEC treaty); case 6/64, Costa v. ENEL, 1964 ECR 585 (article 53 - free right of establishment, and article 37 - nondiscrimination against other member state nationals, are directly applicable); case 2/74 Reyners v. Belgian State, 1974 ECR 631 (article 52, dealing with freedom of establishment, directly applicable); case 33/74, Van Binsbergen v. Bestuur, 1974 ECR 1299 (article 59 with respect to right of establishment directly invalidates laws treating other member state nationals unequally).

of methods to be employed is left to the member state. Notwithstanding this indication in the treaty that directives were intended chiefly to stimulate member state enactment of national law, the Court of Justice first held in 1970 that a provision of a directive may have direct effect.[92] The Court of Justice has declared that directives, or parts of directives, may have effect in national law without any receiving activity under national law if they are unconditional and sufficiently precise.[93] In 1977 the Court of Justice held that national courts may invalidate national legislation and regulation pursuant to a directive and that Community rights may be invoked before any national judge.[94] It said that any judge may determine not to apply national law in conflict with a directly effective provision without having to wait for any legislative or other constitutional procedure.[95]

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92. Case 33/70, SpA SACE v. Ministry for Finance, 1970 ECR 1213. See also case 41/74, Van Duyn v. Home Office, 1974 ECR 1337; case 51/76, Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen, 1977 ECR 629.

93. For a review of the Court of Justice's jurisprudence on direct effect, see Pierre Pescatore (Judge at the European Court), "The Doctrine of 'Direct Effect': An Infant Disease of Community Law," 1983 European Law Review 155.

94. Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., 1978 ECR 629.

95. Id. at 645-46.

In 1979 the Court reaffirmed that when a directive allowed for an implementation period on the part of member states and a member state failed to implement the directive within the allowed time, then existing national legislation in conflict with the directive could no longer be applied by national courts. Only the provisions of the directive could be applied.[96] The Court of Justice's jurisprudence on direct effect does not absolve member states of the obligation to implement directives by national law.[97]

In the early cases direct effect was invoked by an individual acting against a member state. Despite some suggestions in the Court of Justice's jurisprudence that an individual might invoke a directly effective provision of a directive against another individual,[98] the Court has

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96. Case 148/78, Pubblico Ministero v. Ratti, 1979 ECR 1629; case 8/81, Ursula Becker v. Finanzamt Munster-Innenstadt, 1982 ECR 53, 71 ("whereas the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.").

97. Case 102/79, Commission v. Belgium, 1980 ECR 1473, 1487 (direct effect of directive is no excuse for member state failing to incorporate it into national law).

98. See case 127/73 BRT v. SABAM, 1974 ECR 51, 62; case 36/74, Walrave v. Association Union Cycliste Internationale, 1974 ECR 1405, 1418-19; case 43/75, Defrenne v. Sabena, 1976 ECR 455, 475; case 106/77, Amministrazione delle Finanze

limited the doctrine of direct effectiveness to actions against a state.[99] To do so, the Court relied on the provision of Article 189 of the EEC Treaty that a directive is binding only on the member states to which it is addressed.[100]

The Court of Justice's declaration of the direct effectiveness of directives is not in itself sufficient to ensure that national courts will in fact give them direct effect. The Italian Constitutional Court only recently accepted the full supremacy of Community law over national legislation, more than twenty-five years after the entry into force of the EEC Treaty.[101]

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dello Stato v. Simmenthal S.p.A., 1978 ECR 629, 643. See also Alexander Easson, "Can Directives Impose Obligations on Individuals?" 4 European Law Review 67, 69 (1979); Gerhard Bebr, Development of Judicial Control of the European Communities (Nijhoff, the Hague, 1981).

99. Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), 1986 ECR 723.

100. But see Josephine Steiner, Textbook on EEC Law 26-27 [citing cases 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen 1984 ECR 1981 and 79/83 Harz v. Deutsche Tradax GmbH 1984 ECR 1921] (Blackstone Press Limited, London, 1988), for review of Court of Justice holdings that the Article 5 of the EEC Treaty obligation that states "take all appropriate measures" to ensure compliance with their Community obligations obliges member state courts, as state authorities, to interpret national law consistently with the provisions of Community law. Such an obligation appears to extend even to state courts resolving disputes in which a state is not a defendant.

101. Constitutional Court, decision no. 170 of June 8, 1984, S.p.A. Granital v. Amministrazione finanziaria, ___

The Court of Cassation has on occasion clearly rejected the direct effect of directives[102]; however, more recently it seems to be coming to accept the doctrine.[103] The Council of State had adopted a more negative view.[104] Any negative jurisprudence of the Council of State and of the Court of Cassation ought to be challenged before the Constitutional Court as contrary to the Constitutional

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Rac. uff. ___ (1984); 29 Giur. cost. 1098 (1984). See Antonio La Pergola and Patrick Del Duca, "Community Law, International Law, and the Italian Constitution," 79 American Journal of International Law 598 (1985).

102. Court of Cassation, first civil section, decision no. 797 of March 9, 1976, Creditwest v. Jenner, 99 Foro it. I, 1542, 1544-45 (1976). See Raffaele Guariniello, "Diritto comunitario e sicurezza sul lavoro: il problema delle direttive inattuate," 135 Giur. it. IV, 1 (1983) (citing Court of Cassation, first civil section, decision no. 4686 of July 21, 1981, Soc. Smithett v. Terruzzi, 22 Diritto comunitario e degli scambi internazionali 187, 193 (1983) (adopting the literal reading of article 189, EEC Treaty)).

103. Court of Cassation, first civil section, decision no. 6523 of December 14, 1979, Foro italiana v. Amministrazione delle Finanze, 103 Foro it. I, 642, 648-49 (1980) (giving direct effect to Community directives on taxes having effects equivalent to tariffs); Case 88/82, Amministrazione delle Finanze v. Armando and Ottavio Leonelli, 1983 ECR 1061, 1075 (provision of a directive revoking a prior regulation "aplies from the date of the notification of the said directive to the Member State in question, whether or not that Member State has already adopted the necessary measures to comply with the provisions of the directive."); Court of Cassation, first civil section, decision no. 6630 of November 9, 1983, Ministero delle finanze v. Leonelli, 107 Foro it. I, 76, 85 (1984).

104. Council of State, fourth section, decision no. 504 of May 6, 1980, S.P.A. Curtis v. Ministero della Sanita, 133 Giur. it. III, section 1, 21, 26 (1981).

Court's recent decisions concerning the article 11 of the Constitution incorporation of Community law into national law.[105]

Notwithstanding the lack of unanimous and unambiguous guidance from the highest ordinary courts, one pretore has issued a judgment which fully embraces the concept of direct effect.[106] In that case the pretore acquitted a person who marketed a shampoo which did not comply with Italian law's requirements on biodegradability of detergents, but which did comply with a Community directive which had not yet been implemented in Italy.

Various Community environmental directives contain directly effective provisions. With regard to air pollution, the directives on ambient air quality fix standards which Italy is unconditionally required to meet by a certain date and which are numerically defined.[107] These directives also contain directly applicable provisions

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105. See supra n. 101.

106. Pretore of Prato, judgment of May 31, 1978, reported in Dir. com. scambi. int. 1978, 739, and commented on by Carlo Mastellone, "The Judicial Application of Community Law in Italy, 1976-1980," 19 Common Market Law Review 153, 159-160 (1983).

107. Directive 80/779/EEC of July 15, 1980, 23 O.J. Eur. Comm. (No. L 229) 30 (1980) (sulfur dioxide and particulates); Directive 82/884/EEC of December 3, 1982, 25 O.J. Eur. Comm. (No. L 378) 15 (1982) (lead); Directive of March 7, 1985, 28 O.J. Eur. Comm. (No. L 87) 1 (1985) (nitrogen oxides).

requiring that no action be taken which would degrade ambient air quality from present levels.[108]

If there is a right under national law for individuals to assert these rights against the state, then pursuant to the direct effect doctrine it would seem that the state can be prevented from taking action in contrast to them. For example, the state action violating the directly effective provisions of the sulfur dioxide and particulate directive setting ambient air quality standards would be the granting of a pollution permit which would lead to exceeding those standards. In Italy the jurisprudence relative to the right to a healthy environment may become a basis for individuals to be able to gain standing to assert that an administrative authorization which would lead to violation of the limits established by a directive would violate their rights to enjoy air quality at least as clean as that required by the directive.

It is unclear whether such rights ought to be categorized as legitimate interests, as subjective rights, or as both. The confusion about the proper doctrinal classification of these rights and consequently about which court has jurisdiction over claims for their enforcement does not lessen the forcefulness of the Community law on

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108. E.g. article 9, directive 80/779/EEC.

direct effect. In an early case, the Court of Justice said that the classification of a right as a subjective right or as a legitimate interest was an internal matter for Italian law, but that whatever the answer the Community law right must be protected.[109]

If the Community directive is appropriately implemented by national law, the direct effect issue is moot. However, absent such implementation, Community norms may come to be viewed as a useful addition to the judiciary's arsenal of techniques for overcoming the inadequacies of the public administration. They may help prevent the worsening of air quality, and by paralyzing concession of new permits, they may awaken political interest in establishing an effective administrative system capable of ensuring the attainment of air quality goals.

3. France

French judges in the conduct of administrative law have been primarily concerned with ensuring that the public administration remains within the bounds of its powers established by law. The great strength of the public administration and of the executive in post war France has

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109. Case 13/68, Salgoil v. Ministry of Foreign Trade, 1968 ECR 662.

challenged the highest French courts to ensure the principle of the rule of law. In meeting this challenge, French judges have established their potential for assertiveness. However, in practice French administrative judges have shown themselves reluctant to challenge the public administration with regard to particular decisions. The reform of the enquete publique procedure, previously a largely empty formality, provides for meaningful public participation and may make French administrative courts important actors in air pollution control efforts.

a. How the Conseil d'Etat established the independence of administrative judges

The traditional heavy reliance of French administrative law on administrative judicial review[110] became even more necessary because of the constitutional remedy adopted to resolve the political instability of the Third and Fourth Republics. The 1958 constitution establishing the Fifth Republic gives truly remarkable powers to the president and the administration. A literal reading of the constitution could imply that these powers are unchecked by either

110. See Jean Waline, "L'evolution du controle de l'administration depuis un siecle," 100 Revue du droit public 1327 (1984).

legislative or judicial authorities. However, the jurisprudence of the Conseil d'Etat, the highest administrative court, and to a lesser extent the constitutional establishment of a form of constitutional court have ensured continued respect for the rule of law.[111]

Prior to 1958, French constitutional law made the legislature the supreme source of law. Legislation could cover any topic; it was not subject to any kind of judicial constitutional review; and it certainly overruled an administrative act of the government. But, like in contemporary Italy, the incapacity of Parliament to pass laws in timely fashion made it necessary to grant quasi legislative powers to the government. In large part, the 1958 Constitution was a "constitutionalization" of previous unconstitutional practices (decrets-lois, lois-cadres, etc.).

The profound innovation of the 1958 constitution was to grant the administration regulatory power independent of the legislature. Article 34 of the 1958 constitution spells out the limits of legislative powers.[112] Article 37 establishes

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111. For recognition of this point, see Georges Vedel, Droit Administratif 33, 380-86 (7th ed., Paris, Presses Universitaires de France, 1980).

112. Article 34 provides that legislative enactments, i.e. laws, are to fix the rules concerning civil rights, national defense, citizenship, marriage, inheritances, criminal law, taxation, nationalizations, and denationalizations. Laws

the breadth of administrative power by providing that all matters not enumerated by article 34 fall within the realm of regulation.

Following adoption of the 1958 constitution, there was fear that article 37 granted uncontrolled discretion to the president and the administration. To appreciate how the administrative courts have avoided this result, it is necessary to understand their structure and history.

The administrative courts exist in France as the result of a unique notion of the separation of powers. The French view is that the judicial branch should not in any way interfere with the administrative or executive branch. Yet, there is the view that the administration must be subject to the law in two senses. Its acts should be subject to review for conformity with the law, and it should be responsible for damages it causes when it violates the law.

The jurisprudence as to the criteria for administrative jurisdiction has had a long evolution,[113] and is now interpreted to establish the administrative courts as

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are also to determine the fundamental principles of the organization of national defense, civil law, commercial law, and labor law. Article 34 further specifies that the budget and the general economic and social goals of the state are to be determined by law.

113. A famous milestone was Tribunal des conflits, decision of February 8, 1873, "Blanco," 1873 Receuil Dalloz, Jurisprudence, part III, 22.

serving for any action against the state in the exercise of public power.[114] In addition to actions against the state, actions may be brought against private entities exercising a public power.[115]

Although the Conseil d'Etat has a long history as an administrative court, the French administrative courts assumed their modern form in 1953 when tribunaux administratifs, administrative courts of first instance, were created. At that time the Conseil d'Etat became a court of appeal.[116]

Prior to the 1958 constitution the administrative courts reviewed the legality of administrative acts against the law, e.g. statutes and decrees, and against the quasi constitutional "general principles of law" (principes generaux du droit). The Conseil d'Etat has developed the concept of general principles of law through its case law. The concept includes many fundamental rights ordinarily considered part of constitutional law.[117]

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114. Vedel, supra n. 111 at 146.

115. Id. at 150.

116. Decree of September 30, 1953. For the subsequent regulation of the tribunaux administratifs, see Andre de Laubadere, Traite de Droit administratif 427-30 (8th ed., Paris, Librairie generale de droit et de jurisprudence, 1980).

117. The following have been identified as general principles of law: freedom of opinion and thought, freedom

Article 37 of the 1958 constitution clearly removes a category of administrative acts from review in light of legislation. It does this by providing that if a subject matter is not specifically identified as within the scope of legislative regulation by statute, then it is reserved to the administration for regulation. The unanswered question at the adoption of the constitution was whether the administrative courts could continue to review administrative acts in light of the quasi constitutional general principles of law. The Conseil d'Etat said that they could.

The Conseil d'Etat's fundamental decision for ensuring the continued subjection of administrative acts to these almost common law constitutional principles occurred shortly after adoption of the 1958 constitution.[118] At issue was a provision of the 1946 constitution which gave the president of the council (prime minister) truly autonomous powers for "colonial" matters. The Conseil d'Etat held that even these

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of commerce, equality, self defense in judicial proceedings, the adversary character of judicial proceedings, nonretroactivity of administrative decisions, the obligation of administrative impartiality, the obligation of the administration to indemnify its agents for condemnations pronounced against them when they were not at fault, the ban against the administration giving away public property, unjust enrichment, and double jeopardy. Id. at 375-76.

118. Council of State, decision of June 26, 1959, Syndicat des Ingenieurs-Conseils, 1959 Recueil Dalloz, Jurisprudence 541, 542.

powers were subject to general principles of law because of the preamble to the 1946 constitution. The preamble of the 1946 constitution, which is incorporated by reference into the preamble of the 1958 constitution, provides:

> Il [le peuple francais] reaffirme solenellement les droits et les libertes de l'homme et du citoyen consacres par la Declaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la Republique.[119]

Shortly afterwards, this jurisprudence was confirmed with respect to the exercise of the regulatory powers under article 37 of the 1958 constitution.[120]

In addition to the administrative courts, the Conseil Constitutionnel is another guarantee of the rule of law in the French system. However, the Conseil Constitutionnel, unlike the Italian Constitutional Court or any American court, can only pass on the constitutionality of a law prior to its promulgation. The Conseil Constitutionnel acquires jurisdiction in two ways. Under article 61 of the constitution, it automatically passes on the

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119. (The French people solemnly reaffirms the rights and liberties of man and of the citizen consecrated by the Declaration of rights of 1789 and the fundamental principles recognized by the laws of the Republic.)

120. Council of State, decision of October 28, 1960, Martial de Laboulaye, 1961 L'Actualite Juridique: Droit Administratif 20.

constitutionality of organic laws. Organic laws are referred to in a number of articles of the constitution without being generally defined. From the constitution's references to organic laws, they can be categorized as treating the functioning or organization of the public authorities.[121] Article 61 also permits the President, prime minister, or president of either house of parliament to submit a law to the Conseil Constitutionnel for review prior to promulgation. The 1974 amendment to article 61 of the constitution[122] extends this power to sixty deputies or sixty senators.

The effect of these provisions is that specific administrative acts cannot be challenged before the Conseil Constitutionnel as unconstitutional. For this reason the Conseil Constitutionnel has not constituted a limit on administrative discretion, even though its decisions are constitutionally defined as definitive. Pursuant to the article 62 of the constitution's proclamation of the definitiveness of Conseil Constitutionnel decisions, the Conseil Constitutionnel's identification of constitutional

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121. See Raymond Barrillon, Jean-Michel Berard, Marie Helene Berard, Georges Dupuis, Alain Grange-Cabane, and Yves Meny, Dictionnaire de la Constitution: La V' Republique 196 (Paris, editions Cujas, 1976).

122. Constitutional law no. 74-904 of October 29, 1974, 1974 JO 11035.

principles should be authoritative for the Conseil d'Etat. However, were the Conseil d'Etat to have a view different from that of the Conseil Constitutionnel, there is no mechanism to appeal a decision of the Conseil d'Etat to the Conseil Constitutionnel. This kind of conflict has in fact occurred with respect to the application of Community law in France.[123]

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123. The French courts have conflicted on the acceptability of Community law. Article 55 of the constitution provides for the supremacy of regularly ratified or approved international law on condition of its reciprocal application by other states. In 1975 the Conseil Constitutionnel seemed to open the way for easy acceptance of Community law. Decision of January 15, 1975, 1975 Receuil Dalloz Sirey, Jurisprudence 529. In a decision involving a challenge to a proposed law on abortion as inconsistent with the European Convention on Human Rights, it held that refusing to apply a national law because of its inconsistency with an international rule is not constitutional review. Under this holding, the ordinary civil and administrative courts could address questions of the applicability of Community law and of its supremacy over national law without crossing the boundary into the territory of constitutional review, from which they are prohibited.

The Cour de Cassation a few months later followed the Conseil Constitutionnel's lead. Court of Cassation, Chambres mixtes, decision of May 24, 1975, Administration des Douanes v. Societe Vabre et Societe Weigel, 1975 Receuil Dalloz Sirey, Jurisprudence 497, 506; 2 Common Market Law Review 336 (1975). It held that Community law took priority over national law enacted subsequent to ratification of the EEC Treaty. It also found that the power of member states to bring proceedings before the European Community Court of Justice against other member states which fail to comply with the EEC Treaty satisfied the reciprocity requirement. Shortly afterwards it held that the Treaty also prevails over earlier French legislation. Court of Cassation, third civil chamber, decision of December 15, 1975, von Kempis v. Geldof, 1976 Receuil Dalloz Sirey, Jurisprudence 33, 39-40; 2 Common Market Law Review 152 (1976).

Nonetheless, on a large number of occasions the Conseil

Unfortunately for the application of Community jurisprudence, the Conseil d'Etat has rejected this principle. Council of State, decision of October 22, 1979, Union democratique de travail, 36 L'Actualite Juridique: Droit Administratif 39 (1980). See also Council of State, decision of March 1, 1968, Syndicat general de fabricants de semoules, 1968 Recueil Dalloz Sirey 285, 286; 1970 Common Market Law Review 395 (refusal to disapply legislative text conflicting with earlier Community regulation). In a case challenging the election procedures for representatives to the European Parliament, the Conseil d'Etat observed that assessing the conformity of a national law adopted subsequent to the EEC Treaty would be equivalent to passing on its constitutionality, a power which the Conseil d'Etat does not have. Decision of October 22, 1979, id. If the Conseil d'Etat persists in its view that disapplication of a national law because of its nonconformity with Community law is a constitutional question, the effective supremacy of Community law will be seriously limited in France. This is because the Conseil Constitutionnel can only pass on the constitutionality of a law prior to its promulgation. Moreover, the Conseil d'Etat has created an additional barrier to the application of Community law in France. It has squarely rejected the Court of Justice's view of direct applicability by holding that only acts first received into national law may have any effect in internal law. Council of State, decision of December 22, 1978, Cohn-Bendit, 1979 Recueil Dalloz Sirey, Jurisprudence 155; reconfirmed by Savincast, November 28, 1980, Centre international dentaire, February 25, 1981.

Even more threatening for the application of Community law than rejection of the direct effect doctrine is the reasoning by which the Conseil d'Etat reached this conclusion. The Conseil d'Etat rejected the direct effect doctrine based on a literal reading of article 189 of the treaty. It found the treaty language to be so clear that no reference to the Community Court was required to interpret it. Reliance on the so called acte clair doctrine provides the Conseil d'Etat with an easy way to avoid its obligations under article 177 of the EEC treaty to refer questions to the Court of Justice. See Gerhard Bebr, "The Rambling Ghost of 'Cohn-Bendit': Acte Clair and the Court of Justice," 20 Common Market Law Review 439 (1983).

Constitutionnel has recognized certain general principles of law as constitutional principles[124] and thereby increased their persuasiveness as authority. Since its 1971 decision[125] recognizing that the preamble of the French constitution, which makes broad statements about substantive and procedural rights, is a source of constitutional rights, the Conseil Constitutionnel has begun to play a much greater role in the elaboration of the content of French legislation.[126] However, because of the fact that the Conseil Constitutionnel's jurisdiction can be invoked only when legislation is adopted and not at some later time when an actual controversy arises, it could not have preserved the independence of administrative judges in the way that the Conseil d'Etat did. Accordingly, the Conseit d'Etat's actions were all the more bold and essential.

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124. See Vedel, supra n. 111 at 383 citing the following examples: freedom of association (decision of July 16, 1971, 1972 Receuil Dalloz-Sirey, Jurisprudence 685; 1971 JO 7114); equality before the law (decision of December 27, 1973, 1973 JO 14004); equality before the courts (decision of July 23, 1975, 1976 L'Actualite Juridique: Droit Administratif 44; 1975 JO 7533); equal treatment of civil servants (decision of July 15, 1976, 1976 L'Actualite Juridique: Droit Administratif 622; 1976 JO 4330).

125. Decision of July 16, 1971, 1972 Recueil Dalloz, Jurisprudence 685; 1972 JO 7114.

126. See Anna DeVita, "I valori costituzionali come valori giuridici superiori nel sistema francese," 1984 Quaderni costituzionali 41.

b. The new enquete publique: a potential remedy to judicial reticence

Administrative actions for exceeding authority, although easily brought, have had limited importance because the administrative courts are unlikely to frustrate the public administration's intent. With regard to air pollution from industrial sources, the public administration's intent is expressed in permits granted under the authority of the Commissaire de la Republique, a local representative of the central government.[127] The standard legal device for contesting a decision of the public administration, such as the grant of an air pollution permit, is a legal challenge for exceeding authority, known as recours pour exces du pouvoir.[128] As previously

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127. The principal French air pollution legislation is law no. 61-842 of August 2, 1961, 1961 JO 7195; law no. 76-663 of July 19, 1976, 1976 JO 4320. See Del Duca, supra n. 2.

128. Vedel, supra n. 111 at 712. Directly damaged parties can also seek damages and closure of the offending plant in the civil courts. Article 1382 et seq. of the civil code. The civil judge can order changes to minimize future damage as long as such orders do not conflict with orders of the administration. See Christian Gabolde, Les installations classees pour la protection de l'environment 324-25 (Editions Sirey, 1978). However, like the administrative courts, the civil courts are reluctant to interfere with administrative authorizations by ordering closure of a plant. See The Law and Practice Relating to Pollution Control in France, 2d ed., at 5-6 citing Court of Cassation, Ch. civ., Premiere sect. civ., decision of November 5, 1963, 1964 Receuil Dalloz, Jurisprudence 178 (Civil courts can

discussed, a finding of exceeding authority can be based on violation of a specific legislative enactment or alternatively on violation of a general principle of law. A finding of exceeding authority results in annulment of the act challenged.

It is relatively easy to bring this kind of action. The administrative courts grant capacite d'ester en justice (capacity to act) to associations, including those which are not formally registered with the authorities.[129] Interet a agir (interest to act) is another kind of standing criterion which must be met. The interest must be legitimate and reasonable and must be personal to the individual or group bringing the action.[130] Although the case law on this point

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entertain nuisance actions, but they cannot contradict measures taken by the administration in the public interest. Closing a classified installation permitted by the public administration constitutes an impermissible contradiction.).

129. Id., at 725 citing Council of State, decision of March 21, 1919, dame Polier, 1919 Receuil Dalloz, Jurisprudence part III, 1, 5 (the conclusions of M. Riboulet, commissaire du Gouvernement, at 2-3 are for an extremely broad view of the capacity to ester en justice); decision of October 31, 1969, Syndicat de Defense des Canaux de la Durance, 1970 L'Actualite Juridique: Droit Administratif 252. Rene Hostiou, "Amenagment et environnement: le contentieux associatif devant les juridictions administratives," 10 Droit et ville 215, 218 (1980).

130. Vedel, supra n. 111 at 725-29.

is somewhat fragmented,[131] it is clear that access to the administrative courts is relatively unrestricted.[132]

The benefit of the liberality of standing is limited by the administrative courts' reluctance to correct administrative decisions.[133] It is virtually impossible to obtain a stay of execution of a decision pending resolution of the judicial proceedings.[134] Administrative judges seem to be less hesitant to reform administrative decisions concerning industrial sources of pollution than other matters.[135] However, French administrative judges are generally likely to stress the positive aspects of "progress." On a basic political question, as for example nuclear power where proceedings brought by associations have

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131. See id.

132. Environmental associations generally bring their actions on the theory of exceeding authority rather than as actions for indemnisation (compensation) because except for anglers associations, the conditions for establishing damages are too severe. Rene Hostiou, "Amenagement et environment: le contentieux associatif devant les juridictions administratives," 10 Droit et ville 215, 216-17 (1980). In general, proceedings brought by associations have been useful for indicating gaps in the law and for clarifying informal administrative practices as expressed in circulaires, instructions, and directives. Id. at 235-36.

133. Id. at 240.

134. See Francis Caballero, Essai sur la notion juridique de nuisance 124-25 (Paris, Librairie generale de droit et de jurisprudence, 1981).

135. Id. at 30-31.

been systematically rejected,[136] the courts are unlikely to run counter to the administration. A study of all the environmental decisions of the Conseil d'Etat from 1971 to 1982 found that the Conseil d'Etat systematically decided against environmental interests, especially when the economic interests at stake were large.[137] Finally, the French administrative judge does not have the power to issue injunctions against the administration; thus, enforcement of decisions can be difficult.[138]

The 1983 law reforming the procedure for the enquete publique[139] may help overcome the reticence of administrative judges by its encouragement of public participation. Significantly, the heading of the law denominates its subject matter as the "democratization" of the enquete publique.

An enquete publique is required for the award of an air pollution permit to an industrial facility.[140] To obtain an authorization to operate an installation of the first class,

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136. Hostiou, supra n. 132 at 233 note 6.

137. Francis Caballero, "Le Conseil d'Etat, Ennemi de l'environnement?" 1984 Revue Juridique de l'Environnement 3.

138. Id. at 242.

139. Law no. 83-630 of July 12, 1983, 1983 JO 2156.

140. The enquete is required by article 5, law no. 76-663 of July 19, 1976, 1976 JO 4320, and by article 5 of the decree no. 77-1133 of September 21, 1977, 1977 JO 4897.

i.e. an industrial installation of one of the categories judged to present serious pollution problems, a request must be made to the Commissaire de la Republique (the new name for the former departmental prefect)[141] containing detailed site and process information[142] as well as an environmental impact study.[143] Because these studies are performed by the promoters of the project, they have been criticized as generally lacking in objectivity and completeness.[144]

After the request is completed, the enquete publique begins. The procedure for an enquete publique is for a designated person to receive comments from the public and then prepare and submit a report to the Commissaire de la Republique. The old procedure was widely criticized[145]

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141. The structure of relations between the central government and the departements was modified by law no. 82-213 of March 2, 1982, 1982 JO 730; and law no. 83-8 of January 7, 1983, 1983 JO 215.

142. Article 2, decree no. 77-1133 of September 21, 1977, 1977 JO 4897.

143. Article 2, law no. 76-629 of July 10, 1976, 1976 JO 4203. Article 3(4), decree no. 77-1133 of September 21, 1977, 1977 JO 4897, reiterates the necessity of these impact studies for classified installation permits.

144. Gilbert-Francois Caty, "Associations ecologiques s'organisent contre la pollution industrielle," 107 Humanisme et Entreprise 1, 6 (77 rue de Villiers, 92 Neuilly) (1980).

145. See id.; Hostiou, supra n. 132 at notes 6-7 (describing the entire process as "une formalite dont l'objet n'est fondamentalement que de legitimer une decision elaboree unilateralement par les pouvoirs publics" [a

because the report had no legal effect at all on the permitting decision; the departmental prefect chose the person; the content of the report was completely at the person's discretion; the person chosen was usually a retired mayor or public functionary; and it was sufficient to publicize the enquete publique by posters in the town halls of the area the departmental prefect judged to be effected.

The reform made the procedure more serious.[146] The administrative court of first instance for the area now designates the Commissaire or Commissaires for the investigation.[147] Whether there is one or more depends on the "nature and importance of the operations."[148] The Commissaire de la Republique, as the authority who has ultimate responsibility for the permitting decision, is obligated to publicize the enquete by all appropriate means.[149] The enquete lasts from four to six weeks,[150] and

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formality whose fundamental purpose is to legitimate a decision unilaterally elaborated by the public authorities]); Cabellero, supra n. 131 at 162-68.

146. Law no. 83-630 of July 12, 1983, 1983 JO 2156. Preexisting laws remain in force to the extent they do not contradict the new law. Id., article 1.

147. Id., article 2.

148. Id.

149. Id., article 3.

150. Id.

all interested parties must be heard.[151] The eventual report must take account of all the counter proposals made.[152]

If the Commissaire de la Republique makes an affirmative decision notwithstanding a negative report by the Commissaire, or Commissaires, of the investigation, the competent administrative tribunal may annul the decision on one of the grounds identified in the report if it finds such a ground to be serious and of a nature to justify annulment.[153] The persons investigating are paid by the state, but the other expenses of the investigation are born by the party seeking the permit.[154]

Following submission of the report the Commissaire de la Republique has three months to decide whether and on what terms to grant the authorization.[155] Once the final

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151. Id., article 4.

152. Id.

153. Id., article 6.

154. Id., article 8.

155. Article 11(2), decree no. 77-1133 of September 21, 1977, 1977 JO 4897. This decree requires the Commissaire de la Republique to ask for a number of nonbinding opinions. They are from the municipal councils of the municipalities affected (article 8, id.) and various departmental services (article 9, id.). The prefect must present the report of the engineer of the corps des mines to the Conseil Departementale d'hygiene, before which the requestor of the authorization may appear, but from which third parties are excluded. Article 10, decree no. 77-1133. The Conseil

decision is issued, the requestor of the permit has two months in which to seek administrative judicial review.[156] Private parties, including associations, and local government entities ordinarily have four years to seek administrative judicial review of the decision on the ground that it will create a public nuisance, endanger public health, public safety or environmental protection, or harm agriculture or historical sites.[157]

The enquete publique procedure is the primary way French judges become involved in air pollution matters. As in the United States, there is no combination of judicial and prosecutorial roles analogous to that of the Italian pretore, and more significantly, the judicial role is not one of active substitution of the public administration. Instead, the role is that of controlling the public administration's respect of statutorily imposed procedural values. The role of the French judge is, however,

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Departementale d'hygiene is composed of doctors and sanitary engineers, as well as representatives of industry groups. Law of February 15, 1902, article 776, Code of Public Health. For especially hazardous activities the opinion of the departmental council is required. Article 15, decree no. 77-1133. For activities affecting more than one department, the opinion of the regional council is requested. Article 16, id.

156. Article 14(1), law no. 76-663 of July 19, 1976, 1976 JO 4320.

157. Article 14(2), id.

potentially more aggressive than that of an American judge in that the French administrative court is apparently allowed to use its agreement with recommendations of the Commissaire of the investigation which were overlooked by the official who awarded the permit as the basis for overturning the award. Although this is a means for the French administrative court to enter in a limited way into the substance of administrative decisions, it does not constitute a judicial substitution for the public administration nearly as complete as that of the Italian judiciary.

4. American judges: active, but not Italian

a. Substantive procedural activism

The theory of American judicial review of administrative decisionmaking resembles the theories of French and Italian judicial review. American judges, like French and Italian judges, are supposed to review administrative decisions to determine whether they conform to applicable substantive and procedural standards, without, however, entering into the substance of the decision to the point of substituting their discretion for that of the administrative decisionmaker. Italian judges, of course, have not conformed their conduct to this theory. The

reality of American judicial review is quite different from the Italian judicial substitution of the public administration, but bears substantial similarity to the new role suggested for French administrative judges by the reformed enquete publique procedure.

At an early stage, American constitutional and administrative law was concerned with whether discretionary authority could be delegated by the legislature to administrative bodies at all, but two 1935 decisions are the only United States Supreme Court cases finding unconstitutional delegation of legislative power to administrative authorities.[158] The focus of American administrative law became the criteria pursuant to which judges would review administrative decisions.[159]

Although federal administrative decisions are ordinarily subject to the Administrative Procedure Act,[160] most of the important decisions under the Federal Clean Air Act are instead subject to the Clean Air Act's own

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158. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). For an extensive review of American administrative law, see Kenneth Culp Davis, Administrative Law Treatise (2nd edition, 1978).

159. For a suggestion that delegation doctrine be reexamined, see Richard B. Stewart, "Beyond Delegation Doctrine," 36 The American University Law Review 323 (1987).

160. 5 U.S.C. §§ 551 et seq.

requirements.[161] Similar to the Administrative Procedure Act, the Clean Air Act requires a notice and comment procedure which establishes a written record on which judicial review is ultimately based. Grounds for judicially overturning a federal Environmental Protection Agency decision on air pollution include arbitrariness, unconstitutionality, exceeding statutory authority, and disrespect of procedure.[162]

The theory underlying the application of these statutory tests is the "interest representation model," a theory of public participation in administrative decisionmaking.[163] According to the interest representation model,

> the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair

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161. 42 U.S.C. § 7607(b), (d).

162. 42 U.S.C. § 7607(d)(9).

163. See Richard B. Stewart, "The Reformation of American Administrative Law," 88 Harvard Law Review 1667, 1679-81 (1975); Stephen Breyer, Regulation and Its Reform 350-54 (Cambridge, MA, Harvard University Press, 1982); David M. O'Brien, "The Courts and Science Policy Disputes: A Review and Commentary on the Role of the Judiciary in Regulatory Politics," 4 Journal of Energy Law and Policy 81 (1983); Kathleen W. Marcel, "The Role of the Courts in A Legislative and Administrative Legal System -- The Use of Hard Look Review in Federal Environmental Litigation," 62 Oregon Law Review 403 (1983); Abram Chayes, "The Role of the Judge in Public Law Litigation," 89 Harvard Law Review 1281 (1976).

representation of a wide range of affected interests in the process of administrative decision.[164]

Although the decision remains in the hands of the public administration, particular interests participate in developing the record on which the decision is made. Particular interests are given the right to comment on preliminary administrative conclusions and to present evidence to support their contentions. If they seek judicial review of the final decision, the decision is subject to invalidation if the reviewing court finds that there was insufficient administrative response to the particular interests' contentions.[165]

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164. Stewart, supra n. 163 at 1670.

165. One difficulty with the interest representation model is that although in theory all interests are equally free to participate, those most directly affected generally have the most interest to participate. In addition, even directly interested parties may often lack adequate resources to participate. Accordingly, parties affected in a diffuse way and parties without resources will not participate unless organized and subsidized.

Another difficulty is that the interest representation model's focus on procedural and participation rights diverts attention from the merits. Commentators have come to question whether increased procedural requirements in fact have any long run impact on outcomes apart from delay. See Breyer, supra n. 163 at 346-50; Stewart, supra n. 163. However, with the current emphasis on deregulation, courts may give more weight to the legislative intent that bureaucratic programs be dismantled than to the procedural values of the interest representation model. Harvard Law Review 505 (1985). See Merrick B. Garland, "Deregulation and Judicial Review," 98 Harvard Law Review 505 (1985).

In addition to actions based on the interest representation model, a federal court can become involved in air pollution decisionmaking as the result of a civil action, which under the Clear Air Act may be brought by any person, including legal persons, to correct a violation of the Act.[166] Such suits may be brought to require compliance with an emission limitation imposed under the Act or to require EPA to fulfill nondiscretionary duties imposed by the Act. Standing is granted to persons who can show "injury in fact" from an agency decision and to associations with at least one injured member.[167]

American judges have been instrumental in regard to air pollution matters. For example, the National Resources Defense Council in the early and middle 1970s challenged with some success the strictness of state implementation plans as approved by EPA in nine states.[168] Also,

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166. 42 U.S.C. § 7604.

167. See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

168. Lettie M. Wenner, The Environmental Decade in Court 45 (Bloomington, Indiana University Press, 1982). Wenner cites: NRDC v. EPA, 421 U.S. 60 (1975); NRDC v. EPA, 484 F.2d 1331 (1st Cir. 1973); NRDC v. EPA, 494 F.2d 519 (2d Cir. 1974); NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974); NRDC v. EPA, 483 F.2d 690 (8th Cir. 1973); NRDC v. EPA, 507 F.2d 905 (9th Cir. 1974); NRDC v. EPA, 481 F.2d 116 (10th Cir. 1973).

litigation initiated by the Sierra Club was instrumental in the adoption of the Clean Air Act provisions aimed at preventing deterioration of air quality in areas presently meeting air quality standards.[169]

b. An example of interest representation and judicial forcing, not substitution

The controversy over the level of pollution control to be required from new coal burning power plants illustrates how the interest representation model functions and how American judges work to prod the public administration to action, rather than themselves directly taking the appropriate action. In response to the 1970 Clean Air Act the federal Environmental Protection Agency (EPA) promulgated the first New Source Performance Standard (NSPS) for coal burning power plants in 1971.[170] The Clean Air Act Amendments of 1977 gave EPA one year to promulgate a new standard.[171] Faced with a Sierra Club suit in federal

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169. Id., at 46-47 citing Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (1972); Frie v. Sierra Club, 412 U.S. 541 (1973); Clean Air Act, Part C-Prevention of Significant Deterioration of Air Quality, 42 U.S.C. §§ 7470-7479; H. H. Rep. No. 294, 95th Cong. 1st Sess. 7, reprinted in U.S. Code Cong. & Ad. News 1077, 1085.

170. 36 Fed. Reg. 24876 (Dec. 23, 1971).

171. 42 U.S.C. § 7411(b)(6).

district court, EPA finally issued the new NSPS in 1979, almost a year late.[172] The new NSPS was also challenged in the courts.

The controversial part of the second NSPS was the extent of additional control of sulfur dioxide. EPA performed extensive research and undertook resolution of conflicting interests, both of which a court would have been ill suited to do. In early 1977 EPA began the rulemaking process by hiring consulting firms to work on a variety of economic and engineering topics.[173] EPA then formulated a tentative proposal which it used for internal discussion and to solicit comment from industry and environmental groups.[174] EPA had consultants develop and run computer models of alternative standards and their effects.[175]

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172. Sierra Club v. Costle, 657 F.2d 298, 316 (D.C. Cir. 1981); 44 Fed. Reg. 33580 (June 11, 1979). See Elisabeth H. Haskell, The Politics of Clean Air: EPA Standards for Coal Burning Power Plants 1 (New York, Praeger Publishers, 1982).

173. Id. at 26.

174. The Teknekron/ICF account is drawn from Haskell. See Haskell at 26-27, 47-51.

175. Haskell at 49-50. EPA's models performed cost effectiveness analysis. Id. at 116. That is, they considered only the trade-offs involved in achieving particular reductions in emission. In effect, emissions were used as a surrogate for benefits. A true cost benefit analysis was not attempted because it would have required too much unavailable information. For example, it would have required predicting the actual location and sizes of new power plants, predicting the impact on air quality through dispersion modeling, estimating the size of the

Many considerations which could not be reduced to a common metric were important in setting the final standard.[176] In addition to overall levels of emissions, impacts on visibility in the West and acid rain in the East were concerns. Environmental problems other than air pollution, such as water use in the West and solid waste disposal had to be considered. The monetary costs to utilities and consumers and the political costs of altering the demands for high sulfur and low sulfur coal had to be balanced. To appreciate the intensity of the conflict between interests favoring continued use of higher sulfur eastern coal and those favoring development of lower sulfur western coal supplies, it can be noted that demand for western coal by midwestern utilities had risen from 0.1% of 93 million tons bought in 1969 to 24.7% of the 119 million tons bought in 1977.[177] Limiting oil consumption and maintaining reliability of electrical power generation were considerations. Judgments had to be made about technological questions such as the feasibility of scrubbers and baghouses, the amount of monitoring data statistically required to prove compliance, and the variability in sulfur

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affected populations, and calculating actual harm based on dose-response relationships.

176. See Haskell at 112-13.

177. Haskell at 10.

content of coal. Regional economic impacts and the investment behavior of utilities also had to be assessed.

In short, the standard depended on a large variety of variables, understanding some of which required simple, but extensive factual information and others of which required rather sophisticated technical knowledge. The decision required, however, was not amenable to purely technical resolution. It required a number of predictive factual judgments and substantial assessment of the relative values of various political interests.

Following promulgation of the NSPS, the Sierra Club, the Environmental Defense Fund, the California Air Resources Board, and industry groups challenged it in court. In a 121 page opinion the Court of Appeals for the District of Columbia Circuit concluded that EPA had not exceeded its statutory authority and that the rule was reasonable.[178]

Although the modeling exercise was at the center of the standard's determination, it did not eliminate subjective assessments from the decisionmaking process. Indeed if it had, a reviewing court would have probably invalidated EPA's decision. The Court of Appeals stressed the importance of public participation by stating:

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178. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

> We conclude that EPA's reliance on its model did not exceed the bounds of its usefulness and that its conduct of the modeling exercise was proper in all respects. We are in fact reassured by EPA's own consciousness of the limits of its model, and its invitation and response to public comment on all aspects of the model. The safety valves in the use of such sophisticated methodology are the requirement of public exposure of the assumptions and data incorporated into the analysis and the acceptance and consideration of public comment, the admission of uncertainties where they exist, and the insistence that ultimate responsibility for the policy decision remains with the agency rather than the computer. With these precautions the tools of econometric computer analysis can intelligently broaden rather than constrain the policymaker's options and avoid the 'artificial narrowing of options that can be arbitrary and capricious.'(footnotes omitted)[179]

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179. Id. at 334-35. In subsequent litigation, despite not having prevailed, the Sierra Club and the Environmental Defense Fund argued that under the Clean Air Act,42 U.S.C. § 7607(f), they were entitled to attorney fees for having represented the public interest. The Court of Appeals held that they were entitled to attorney fees, Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982)., and then awarded the Sierra Club a fee of about $45,000 and the Environmental Defense Fund about $46,000. Sierra Club v. Gorsuch, 684 F.2d 972 (D.C. Cir. 1982). The Supreme Court reversed, holding by a 5-4 vote that at least some measure of success on the merits was required for award of attorney fees. Ruckelshaus v. Sierra Club, 103 S.Ct. 3274 (1983).

Although none of the intervening groups was finally awarded attorney fees, this does not diminish the importance of their participation. EPA knowledge that the record it compiled and its use of the record would be subject to independent scrutiny substantially improved the rigor of its analysis. A corollary of this reasoning is that the Supreme Court erred in disallowing fees to the environmental groups. Even if the groups did not prevail on the merits, they should have been awarded fees to encourage the kinds of contributions they made to improving the decisionmaking process. Accord, Walter B. Russell and Paul Thomas Gregory, "Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the 'Appropriate' Standard (Note)," 18

This case study contrasts, for example, with the litigation initiated by the pretore of Taranto.[180] In that case, the judge of first instance initiated a criminal prosecution of polluters in the absence of administrative action. In this case study judicial action served to force administrative action, action which made use of technical expertise and other resources not readily available to a judge. The difference in the reality of administrative organization and the different theories underlying judicial action both help to explain why the judicial roles vary so greatly.

5. Why Italian judicial activism probably will not follow the French and American models

A comparative legal investigation necessarily focuses on limited analyses of parts of legal systems. On the basis of such an investigation it is accordingly difficult to prove that one form of legal organization in one system is superior to some other form in another system. Nonetheless, it does appear possible to suggest that the Italian form of judicial activism, although perhaps prudent for the Italian

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Georgia Law Review 307 (1984).

180. See supra n. 28.

judiciary in the context of the Italian system, does have significant costs associated with it.

These costs relate to the fact that the Italian judiciary's substitution of the public administration arises in large part from the inadequacy of the public administration. Before dwelling on the consequences of this fact, it should be noted that the inadequacy of the public administration is not the only reason for the different role of the Italian judiciary. For instance, the combination of prosecutorial and judicial roles exemplified by the pretore is alien to the legal systems of both the United States and France.[181] Moreover, there is nothing in American constitutional law approximating the Italian constitutional notions of civil and criminal liability of public officials for failure to undertake discretionary responsibilities.

Nonetheless, judicial proceedings in Italy are all too frequently employed simply because the public administration has failed to act. Although they work to compensate failures of administrative control, they are not a fully adequate substitute because they are only isolated interventions which occur after the fact of damage. Preventive action through a broad based administrative

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181. As discussed supra under heading 2(b), the new code of criminal procedure will abolish this dual role as of October 24, 1989.

program is a more effective remedy for pollution related damages.[182] Moreover, the judiciary is not organized as it might be to fully confront environmental problems.[183] For example, the effectiveness of criminal actions would be increased were all public prosecutors systematically organized to prosecute violations of environmental laws.[184]

In the United States, federal judges have been involved in air pollution matters in two principal ways. First, they have reviewed administrative decisions for compliance with statutory and procedural concerns. Second, they have, in response to citizen suits, required the public administration to take action required by law. The interest representation model pursuant to which American judges review administrative decisions relies on judicial review to ensure meaningful public participation in those decisions.

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182. For recognition of this principle by an Italian magistrate, see Franco Giampietro, Diritto alla salubrita dell'ambiente: inquinamenti e riforma sanitaria 7-8 (Milano, Giuffre, 1980).

183. However, its creativeness in dealing with the ineffectiveness of the public administration has been recognized. See e.g. The Law and Practice Relating to Pollution Control in Italy, 20-22 (2d ed., prepared by M. Guttieres and U. Ruffolo for Environmental Resources Ltd., published by Graham and Trotman for the Commission of the European Communities, 1982).

184. Filippo Salvia, L'inquinamento: Profili pubblicistici 29 (Padova, CEDAM, 1984) laments the lack of attention devoted to the internal organization of the corps of public prosecutors.

The seriousness of participation is assured by the judicial review of the observance of procedural rules regarding participation.

In France the Conseil d'Etat showed boldness in establishing the power of the administrative courts to review the legality of decisions by the public administration. However, in exercising their power, the French administrative courts have shown substantial deference to the public administration. The 1983 law reforming the enquete publique procedure suggests that something approximating the interest representation model could develop in France. The 1983 law permits dissent to be effectively registered in the course of the enquete and invites the reviewing judge to reverse the administrative decision if public input was wrongly overlooked. The enquete procedure and French administrative courts are not identical to American notice and comment rulemaking and federal courts. They are, however, similar in that the judicial role is to review, or at most stimulate, administrative action.

Because of the lack of a coherent and functional administrative system, the United States and French models of judicially enforced participation have not been relevant to Italy. Nonetheless, judicial review of respect for procedural requirements designed to ensure both participation and administrative responsiveness to that

participation seems to be an effective technique for promoting good public administration. Participation with the option of judicial review works to ensure the application of the underlying substantive rules. Further, it ensures a meaningful dialog between the public administration and concerned parties. However, it does presuppose the existence and functioning of a certain level of administrative organization.

Were reform efforts in Italy to succeed in revitalizing the public administration, efforts to change the present role of the judiciary would be advisable. The pathological situation of the judiciary having to substitute itself for the public administration would be made to evolve into a situation in which the judiciary ensures compliance by the public administration with statutory policies. To the extent that revitalization of the public administration is not possible, Italy will continue to see its competent and ambitious judiciary assume an ever more active role as an alternative to a functioning public administration.

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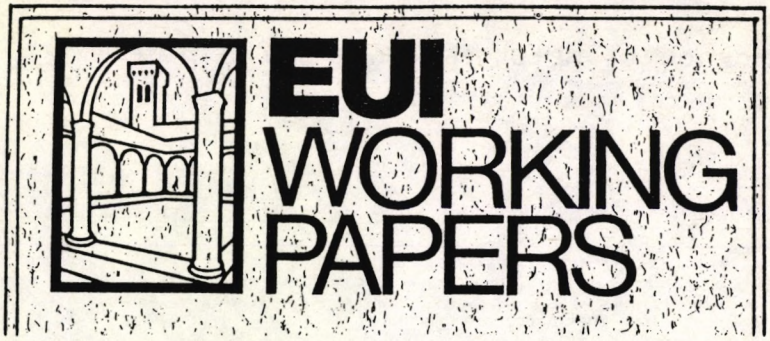

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